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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et. al.*,

Petitioners,

—v.—

PRO FOOTBALL, INC. *d/b/a*
WASHINGTON REDSKINS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF LEAGUE OF VOLUNTARY HOSPITALS AND HOMES OF NEW YORK, REALTY ADVISORY BOARD ON LABOR RELATIONS, INC. AND TANKER SERVICE COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF LEAGUE OF VOLUNTARY HOSPITALS AND HOMES OF NEW YORK, REALTY ADVISORY BOARD ON LABOR RELATIONS, INC. AND TANKER SERVICE COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

This brief in support of respondents is submitted in accordance with Rule 37 of the Rules of this Court. The League of Voluntary Hospitals and Homes of New York, Realty Advisory Board on Labor Relations, Inc. and Tanker Service Committee, as *amici curiae*, have obtained and filed herewith the written consent of petitioners and respondents to the submission of this brief.

INTEREST OF AMICI CURIAE

Although this case arises out of a labor dispute in professional football, its implications far transcend the world of professional sports.

As discussed below, adoption of the position advocated by petitioners and their *amici* would render unlawful collective bargaining conduct routinely engaged in by multiemployer associations and thus entirely undermine the process of multiemployer bargaining, a method of labor-management negotiation that predated both the Sherman Act and the Wagner Act and has become the preferred and routinely accepted mode of collective bargaining in countless industries throughout the United States.

Amici curiae are associations of employers in industries other than professional sports, who, for decades, have engaged in multiemployer bargaining with their employees. Approximately 80,000 of *amici's* employees are presently covered by collective bargaining agreements negotiated on a multiemployer basis.

The League of Voluntary Hospitals and Homes of New York is a multiemployer association whose members operate 60 hospitals and nursing homes—of significantly disparate size—in the New York metropolitan area.[1] Since 1968, the League has engaged in collective bargaining on a multiemployer basis with Local 1199 of the National Health and Human Services Employees Union, and (since 1982) with Local 144 of the Hotel, Hospital, Nursing Homes and Allied Services Union, AFL-CIO. Both Local 1199 and Local 144 represent the full gamut of hospital employees, including clerical, service, maintenance, technical and professional workers. Thus, the positions their members hold at League institutions cover

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[1] The League's members include, for example, Presbyterian Hospital in the City of New York which has approximately 1,500 beds and almost 7,000 full-time employees, and Community Hospital of Brooklyn, Inc., which has only about 130 beds and 420 full-time employees.

an extraordinarily broad range of jobs, including housekeeping workers, nurses aides, clerks, secretaries, pharmacists, MSW social workers, laboratory technologists, radiology technologists and physical therapists. Taken together, these two unions represent approximately 46,000 employees who work at the League's member hospitals and nursing homes.

Over the course of their almost 30-year collective bargaining relationship, the League and Local 1199 have frequently reached an impasse in negotiations. In fact, in the last 20 rounds of bargaining, the parties have reached impasse on about 10 occasions (on average just about once every other bargaining round); and virtually without exception, the League, following impasse, has maintained in effect the employment terms of the expired labor contract until a new collective bargaining agreement was reached. On occasion, the League, after impasse, has unilaterally implemented revised terms. Indeed, in one round of bargaining, the League, following a lengthy strike, implemented revised terms of employment and maintained those revised terms in effect for the two years that were required for the parties to reach a new collective agreement.

The Realty Advisory Board on Labor Relations, Inc. ("RAB") is an organization of employers in the building service industry that, since at least 1979, has engaged in collective bargaining on a multiemployer basis with Local 32B-32J of the Service Employees International Union, AFL-CIO. The members of the RAB own or operate, *inter alia*, approximately 1,000 commercial buildings in the New York metropolitan area in which about 30,000 building service workers represented by Local 32B-32J are employed.

The Tanker Service Committee is a multiemployer association whose members are engaged in the operation of American-flag deep-sea vessels. For approximately 30 years, the Committee has engaged in collective bargaining on a multiemployer basis with District 1 of the Marine Engineers Beneficial Association/National Maritime Union ("MEBA") and District 4 of the Marine Engineers Beneficial Association/National Maritime Union ("NMU") (or their predecessor unions), and with the American Radio Association and

the Radio Officers Union. MEBA is the exclusive collective bargaining representative for all licensed engineers employed aboard the vessels operated by members of the Tanker Service Committee, and the NMU is the exclusive collective bargaining representative for all of the unlicensed personnel aboard those vessels. The American Radio Association and the Radio Officers Union represent radio officers. Approximately 4,000 individuals employed by the members of the Tanker Service Committee are covered by collective agreements negotiated on a multiemployer basis.

During the course of the multiemployer bargaining in which it has engaged, the Committee and one or more of the unions have reached impasse, and on most such occasions the Committee has maintained in effect the employment terms of the expired agreement until a new multiemployer contract was reached. In 1994, after negotiating for several months following the expiration of the agreement between the Committee and the NMU, the parties reached impasse and the Committee unilaterally implemented revised terms of employment that were continued in effect for a period of approximately two months until a new collective bargaining agreement was reached.

The interests of *amici curiae* are not represented by any of the parties to this appeal. Accordingly, we submit that by this brief the *amici curiae* provide an important and otherwise missing perspective to this Court.

SUMMARY OF ARGUMENT

Three Circuits of the United States Court of Appeals—the Second, Eighth and District of Columbia Circuits—have had the opportunity to evaluate the applicability of the antitrust laws to employment terms maintained in effect or unilaterally implemented by a multiemployer group after the expiration of a collective bargaining agreement and after the bargaining parties had reached (or were alleged to have reached) an impasse in negotiations. All three courts concluded that employees may not mount antitrust challenges so long as the unions they had designated as their exclusive bargaining representatives remained in a collective bar-

gaining relationship with their employers. Having chosen to form labor unions and to avail themselves of the benefits and protections of the federal labor laws, so each court reasoned, the employees' recourse was to the rights and economic weapons provided to them by those laws.

While the three Court of Appeals decisions—*Powell*,[2] *Williams*[3] and *Brown*—all arose out of labor disputes between professional athletes and sports leagues, the issues they presented have far broader implications. As demonstrated below, rejection of the principled approach reflected in these decisions and adoption of the positions advocated by petitioners and their *amici* would cripple if not destroy multiemployer bargaining, a longstanding method of labor negotiation that, as this Court has itself emphasized, is a "vital factor" in effectuating the national policy of promoting labor peace through strengthened collective bargaining. *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 409 (1982).

Petitioners here make no showing that multiemployer bargaining is any less "vital" today to the effectuation of this national policy than it was in 1982; and they advance no principled reason for denying to employers—who, with the consent of their union counterparts, bargain collectively on a group basis—the rights and privileges indisputably exercisable by individual employers as part of the collective bargaining process. Indeed, as is also shown below, petitioners and their *amici* propose nothing short of a "massive reshaping" of the collective bargaining regime intended by Congress. *Williams*, 45 F.3d at 691.

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[2] *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

[3] *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3070, (U.S. July 24, 1995) (No. 95-137).

ARGUMENT

I.

Multiemployer Bargaining Is a "Vital Factor" in the Effectuation of the National Labor Policy that Promotes Labor Peace Through Collective Bargaining.

As this Court has remarked on at least two occasions, multiemployer bargaining is a practice that "long" antedated the Wagner Act. *Bonanno*, 454 U.S. at 409; *NLRB v. Truck Drivers Local Union No. 449* ("*Buffalo Linen*"), 353 U.S. 87, 94 (1957). Indeed, "[t]he existence of employer organizations that bargained with unions of employees pre-dated the passage of the Sherman Act in 1890." *Williams*, 45 F.3d at 689. *See* Clarence E. Bennett, *Employers' Associations in the United States: A Study of Typical Associations*, 21-22 (1921).

Although the National Labor Relations Act ("NLRA") makes no explicit reference to multiemployer bargaining, the language of the NLRA clearly contemplates that employers may participate in the bargaining process on a group basis. Thus, Section 2(2) of the NLRA, 29 U.S.C. § 159(2), defines "employer" as "any person acting as an agent of an employer, directly or indirectly," and Section 2(1), 29 U.S.C. § 159(1), defines "person" to include "associations." *Bonanno*, 454 U.S. at 406, 409.[4] And, in defining the rights and obligations of employers, the NLRA makes no distinction between the employer who participates in the collective bargaining process on its own and those who bargain on a group basis through multiemployer "associations."

As has been well recognized, multiemployer bargaining affords both management and labor a number of advantages that

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[4] Similarly, Section 4(b) of the Norris-LaGuardia Act, 29 U.S.C. § 104(b), bars the issuance of injunctions prohibiting any person from becoming or remaining "a member of any labor organization or of *any employer organization*." (Emphasis added.)

facilitate the collective bargaining process and thus foster labor peace. Indeed, the multiemployer mode of bargaining "has become perhaps as important for unions as for employers." *Id.* at 421 n.2 (Burger, C.J., dissenting). *See also id.* at 409 n.3; *Buffalo Linen*, 353 U.S. at 96.[5]

Thus, for example, multiemployer bargaining enables the development of industry-wide programs providing benefits to employees that individual employers might otherwise be unable (or unwilling) to provide. Additionally, by enabling unions (and employers) to concentrate their bargaining resources on the negotiation of a unitary, industry-wide contract, multiemployer bargaining "enhances the efficiency and effectiveness of the collective bargaining process and thereby reduces industrial strife." *Id.* at 410 n.3 (quoting *NLRB v. Charles D. Bonanno Linen Serv.*, 630 F.2d 25, 28 (1st Cir. 1980), *aff'd*, 454 U.S. 404 (1982)).[6]

As a practical fact, if not by definition, the multiemployer mode of bargaining posits that employers who are competitors in the output or product market will agree among themselves upon the terms and conditions that will govern the relationships with their employees. Indeed, multiemployer bargaining contemplates such joint conduct for the precise purpose of avoiding the disadvantages that competition in the labor market may cause. But, as the Court

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[5] Absent NLRB order, of course, multiemployer bargaining requires the consent of both labor and management. *See, e.g., NLRB v. American Printers & Lithographers*, 820 F.2d 878, 882 n.4 (7th Cir. 1987); *NLRB v. New York Typographical Union No. 6*, 632 F.2d 171, 183 (2d Cir. 1980); *NLRB v. Beckham, Inc.*, 564 F.2d 190, 192 (5th Cir. 1977); *Tennessee Products & Chem. Corp. v. NLRB*, 423 F.2d 169, 178 (6th Cir.), *cert. denied*, 400 U.S. 822, (1970).

[6] "[T]he limited funds and personnel of unions often make it very difficult for a union to negotiate separate agreements with each employer in industries where employer units are small." *Bonanno*, 454 U.S. at 421 n.2 (Burger, C.J., dissenting).

has made clear, that is not an evil. To the contrary, a cardinal benefit of multiemployer bargaining is that it enables members of the multiemployer unit to avoid "the competitive disadvantages resulting from nonuniform contractual terms." *Buffalo Linen*, 353 U.S. at 96. Indeed, as the National Labor Relations Board (the "NLRB" or "Board") maintained in *Bonanno*, multiemployer bargaining enables employers to make concessions "'without fear that other employers will refuse to make similar concessions to achieve a competitive advantage.'" *Bonanno*, 454 U.S. at 410.

Not surprisingly, in light of these advantages, multiemployer bargaining has become "the preferred bargaining mechanism" in many industries. *Id.* at 410. In the mid-1950's, approximately four million employees were covered by collective bargaining agreements signed by unions with "thousands of employer associations." *Buffalo Linen*, 353 U.S. at 95. By 1980, over 40% of "major" collective bargaining agreements (*i.e.*, those covering 1,000 or more employees) were multiemployer agreements. *Bonanno*, 454 U.S. at 410.

Multiemployer bargaining has also received direct congressional approval. Thus, at the time of the Taft-Hartley debates, Congress rejected proposals to limit or outlaw multiemployer bargaining—proposals that were greeted "with a storm of protest that their adoption would tend to weaken and not strengthen the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through effective collective bargaining." *Buffalo Linen*, 353 U.S. at 95; *Bonanno*, 454 U.S. at 409.

According to the Court, those debates "demonstrate[d] that Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multiemployer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Buffalo Linen*, 353 U.S. at 95; *Bonanno*, 454 U.S. at 409.

The long history of multiemployer bargaining, the refusal by Congress to outlaw or limit the practice, the significant advantages

that accompany the multiemployer mode of bargaining, the widespread utilization of the mechanism, and the "cogent evidence" of the "vital" role multiemployer bargaining has played in the effectuation of national labor policy have led this Court, the lower federal courts, and the NLRB consistently to reject efforts (whether mounted by labor or management) that would undermine the integrity or stability of multiemployer bargaining units.

Thus, since 1958, the Board's rules ("reflect[ing] an increasing emphasis on the stability of multiemployer units," *Bonanno*, 454 U.S. at 410-11) have barred both employers and unions from withdrawing from multiemployer bargaining once negotiations have commenced absent mutual consent or special circumstances. *See, e.g., Retail Assocs., Inc.*, 120 N.L.R.B. 388 (1958); *Bonanno*, 454 U.S. at 410-11. In *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22 (1973), *enforcement denied*, 500 F.2d 181 (5th Cir. 1974), the Board held that an impasse in negotiations was not a "special circumstance" that permitted withdrawal—a position subsequently adopted by this Court in *Bonanno*.

In *Bonanno*, impasse had been reached more than six months before the employer gave notice of its purported withdrawal from the multiemployer unit, that employer had been the target of a selective strike (and had hired replacements), and most of its fellow association members had locked out their employees for some five months. 454 U.S. at 407-08. Notwithstanding these circumstances, the Court approved the Board's rationale that there was "little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways." *Id.* at 412.[7] Adopting the Board's conclusion that "permitting withdrawal at impasse would as a practical matter undermine the utility

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[7] The Court came to this conclusion over the dissent of Chief Justice Burger, who characterized the record facts as showing "no signs that the parties would return to the bargaining table," and as reflecting "no 'temporary deadlock or hiatus in negotiations,'" but rather "a complete breakdown in negotiations coupled with a prolonged strike and lockout." *Bonanno*, 454 U.S. at 422.

of multi-employer bargaining" (*id.*), the Court emphasized that the "proper and pre-eminent goal" was "[m]aintaining the stability of the multiemployer unit." *Id.* at 419.

Preservation of the integrity of the multiemployer bargaining unit was, of course, justification for the multiemployer lockout in *Buffalo Linen*, 353 U.S. at 93-94; and it was "the key" (*Bonanno*, 454 U.S. at 419) to the Court's decision in *NLRB v. Brown*, 380 U.S. 278 (1965), finding no unfair labor practice when the members of a multiemployer unit hired temporary replacements following a lockout.

While these cases arose under the federal labor laws, they surely involved conduct that, if antitrust principles applied, constituted price-fixing and a group boycott, *per se* violations of the Sherman Act. *Williams*, 45 F.3d at 692. But it is worthy of note that there is not even a hint in the Court's opinions that conduct permitted under the federal labor laws (including even a lockout, a weapon not expressly authorized by the statutory language, *Buffalo Linen*, 353 U.S. at 92) could expose the members of a multiemployer unit to antitrust liability. Nor do these cases suggest that members of a multiemployer unit do or should—because of the antitrust laws or otherwise—enjoy less than the full range of rights and privileges under the labor laws because they bargain on a group basis.

Indeed, and even apart from the "sports" trilogy of *Powell*, *Williams*, and *Brown*, when such arguments have been advanced and the antitrust laws specifically invoked, the federal courts have uniformly rejected the contention.

Thus, in *Kennedy v. Long Island Rail Road Co.*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963), the Second Circuit rejected a Sherman Act challenge to a multiemployer strike insurance fund, holding that the fund "was an instrument of self-help properly employed in the process of collective bargaining." *Id.* at 371. In *Clune v. Publishers' Ass'n*, 214 F. Supp. 520 (S.D.N.Y.), *aff'd*, 314 F.2d 343 (2d Cir. 1963), the Second Circuit affirmed the district court's holding that a multiemployer lockout of its unionized

employees was not a "group boycott" under the antitrust laws, but was instead conduct sanctioned by federal labor policy. *Accord Chicago Midtown Milk Distrs., Inc. v. Dean Foods Co.*, 1970 Trade Cas. (CCH) ¶ 73,286 (7th Cir. 1970); *Newspaper Drivers & Handlers' Local No. 372 v. NLRB*, 404 F.2d 1159 (6th Cir. 1968), *cert. denied*, 395 U.S. 923 (1969).

Similarly, in *Amalgamated Meat Cutters & Butchers Workmen v. Wetterau Foods, Inc.*, 597 F.2d 133, 136 (8th Cir. 1979), the Eighth Circuit held that the replacement of striking workers "cannot constitute a violation of the antitrust law" because this is conduct that "[f]ederal labor policy sanctions." *Accord United Brick & Clay Workers v. Junction City Clay Co.*, 158 F.2d 552 (6th Cir. 1946). Likewise, in *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004 (5th Cir. 1970), *cert. dismissed*, 404 U.S. 801 (1971), the Fifth Circuit rejected an antitrust claim asserting that multiple employers, in retaliation for a strike, had refused to deal with the union concerning wages and working conditions. *See also California State Council of Carpenters v. Associated Gen. Contractors, Inc.*, 107 L.R.R.M. 2724, 2725 (9th Cir. 1981) ("although multiemployer bargaining units may affect or restrain competition in the area of wages and working conditions, such restraints will not be considered to violate the antitrust laws"); *Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co.*, 475 F. Supp. 482 (S.D.N.Y. 1979) (rejecting antitrust claim based upon alleged conspiracy to fix wages and discriminate against employees favoring unionization), *vacated as moot*, 638 F.2d 7 (2d Cir. 1980).

In sum, as both Congress and the courts have recognized, multiemployer bargaining has long been a fundamental feature of the collective bargaining process and an essential element of national labor policy. Assuming *arguendo* that antitrust policy should be concerned at all with disputes that involve only the labor market,[8]

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[8] *But see* Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 254 (1955) ("No one seriously suggests that antitrust policy should be concerned with the labor

the antitrust laws have not been—and should not in this case be—allowed to subvert fundamental principles of federal labor policy. *See Wood v. National Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987).

II.

Adoption of the Positions Advanced by Petitioners Would Undermine Multiemployer Bargaining and Thus Subvert Fundamental Principles of Federal Labor Policy.

Despite the "vital" role multiemployer bargaining plays in the effectuation of national labor policy, petitioners would construct a separate collective bargaining regime for the multiemployer method of negotiation. More specifically, petitioners and their *amici* would expose the members of multiemployer groups to treble damage antitrust liability for conduct that is not only licensed by federal labor law, but which constitutes a routine—indeed, essential—part of the collective bargaining process. As demonstrated below, there is no justification for this position or for the destruction of the multiemployer bargaining process it would cause.

Petitioners contend principally that the members of a multiemployer bargaining unit should be exposed to antitrust liability for any concerted conduct taken with respect to the terms of employment—including even the maintenance of the *status quo*—at the moment the collective bargaining agreement expires.[9] Alternatively, they propose that antitrust liability may attach to joint employer conduct—whether that conduct be maintenance of the *status quo* or the implementation of new terms of employment—when the parties have reached their first bargaining impasse.[10]

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market *per se*").

[9] Brief for Petitioners ("Pet. Br.") at 45-47.

[10] *Id.* at 47-48.

The Department of Justice and the Federal Trade Commission, as *amici*, urge what seems properly characterized as an "impasse-plus" test, suggesting that any concerted conduct by the members of a multiemployer group be subject to antitrust scrutiny once the employers have had a reasonable opportunity to consult with counsel (so as to determine that impasse has in fact occurred) and to adjust their business operations in order "to eliminate" any "restraint"—not just refrain from the imposition of *new* employment terms—that could give rise to antitrust liability.[11]

None of these proposed standards can be squared with fundamental principles of federal labor policy; and each would undermine, if not destroy, the practice of multiemployer bargaining, a "vital" element of that national policy.

But for the opinion of the district court that was reversed by the decision on appeal,[12] petitioners' principal contention—that antitrust exposure should attach to any concerted conduct affecting the terms of employment as soon as the collective bargaining agreement expires—has been rejected by every court to address the issue. And it is rejected in this very case by the Department of Justice and Federal Trade Commission.[13] The reason is plain: following expiration of a collective bargaining agreement and at least until impasse, employers are *required* to maintain the *status quo* by adhering to the previously bargained terms of employment. *See Laborers Health & Welfare Trust Fund v. Advanced Lightweight*

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[11] Brief for the United States and the Federal Trade Commission as *Amici Curiae* Supporting Petitioners ("U.S. Br.") at 24.

[12] *Brown v. Pro Football, Inc.*, 782 F. Supp. 125 (D.D.C. 1991), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995), *cert. granted*, 64 U.S.L.W. 3414 (U.S. December 8, 1995) (No. 95-388).

[13] *See* U.S. Br. at 16-17.

Concrete Co., 484 U.S. 539, 544 n.6 (1988); *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962).[14]

Nor is there any merit to petitioners' suggestion[15] that union consent to a change in the *status quo* (or, more accurately, a union's demand, backed by the threat of antitrust litigation, for the elimination of an employment term to which it had previously agreed but now views as a "restraint") would do no offense to the NLRA's bargaining scheme.

The *status quo* obligation is not intended merely to protect the interests of unions or employers; rather, "[f]reezing the status quo ante after a collective agreement has expired [is intended to] promote[] industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract." *Laborers Health & Welfare Trust Fund*, 484 U.S. at 545. *See also Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198, 203 (1991) (purpose of *status quo* obligation is to facilitate good faith collective bargaining). Conduct that is *required* by federal labor law cannot violate the antitrust laws.

Nor, for several reasons, should this Court adopt either petitioners' alternative contention that impasse marks the moment when concerted conduct by a multiemployer group becomes subject to antitrust attack or the Government's nebulous "impasse-plus" standard.

First, as even the Government appears to acknowledge, there is often considerable uncertainty as to whether negotiations have reached an impasse—such uncertainty, in fact, that the Board

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[14] Even after impasse, employers are unquestionably permitted by the NLRA to maintain the *status quo*. *See, e.g.*, *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982); *Taft Broadcasting Co.*, 163 N.L.R.B. 475 (1967), *enf'd sub nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

[15] Pet. Br. at 45-47.

and different courts (and even different members of the same court)—as well as the lawyers the Government urges members of a multiemployer group to consult—might well reach different determinations on the matter.[16] Indeed, even within the course of a single labor dispute, an impasse can be reached on multiple occasions (and, by definition, broken with the same frequency).[17] As this Court emphasized in *Bonanno*:

> As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force.

454 U.S. at 412 (quoting the NLRB).

In short, the transitory, if not ephemeral, nature of a bargaining impasse makes that stage of the collective bargaining process especially *un*suitable as a point of demarcation, even if employers dutifully seek legal advice. *Cf. Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 64 (2d Cir. 1979) (existence of impasse is a "[complex] question of fact").

Second, the argument advanced by petitioners and their *amici* that there is no need to accommodate the federal labor laws once impasse has been reached[18] is premised upon a mistaken view of both the nature and significance of a bargaining impasse.

At impasse, an employer, to be sure, is no longer required to maintain the *status quo* and may unilaterally implement revised terms of employment; and the members of a multiemployer unit may enter into interim agreements with the union. But impasse

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[16] *See, e.g., Bonanno*, 454 U.S. at 426 (Burger, C.J., dissenting).

[17] *See, e.g.*, U.S. Br. at 23-24.

[18] *See* Pet. Br. at 37-38; U.S. Br. at 7.

neither rids an employer of its duties under the federal labor laws, nor eliminates the need to continue to accord full reign to national labor policy.

In the first instance, impasse does not leave the employer free to implement whatever new terms and conditions of employment it may desire. Whatever the source of the unilateral implementation right, that right is circumscribed by the cardinal federal labor law principle that the terms implemented may be only those reasonably comprehended by the employer's last proposal to the union.[19] Indeed, while an employer, before a union enters the picture, may be exercising a purported common law right to set the terms of employment, *Katz*, 369 U.S. 736, teaches that once the union is recognized and collective bargaining begins—once, that is, a collective bargaining relationship has been established—the NLRA forbids the employer from changing those terms prior to impasse notwithstanding their supposed common law origin.

Nor does the fact that a member of a multiemployer unit may at impasse enter into an interim agreement with the union change the equation. Even after such an interim agreement is signed, the "pre-eminent goal" of the labor laws remains the stability of the multiemployer unit and thus the multiemployer group may continue to insist "that parties remain subject to unit negotiations in accordance with their original understanding." Moreover, as this Court made clear in *Bonanno*, impasse does not "initiate any right to execute an [interim] agreement inconsistent with the duty to abide by the results of group bargaining." *Bonanno*, 454 U.S. at 415, 416, 419.

By insisting that members of a multiemployer group, at expiration or impasse, act individually, petitioners and their *amici*

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[19] *See, e.g., Emhart Indus., Hartford Div. v. NLRB*, 907 F.2d 372, 377 (2d Cir. 1990); *Southwest Forest Indus., Inc. v. NLRB*, 841 F.2d 270, 273 (9th Cir. 1988); *United Steelworkers v. Fort Pitt Steel Casting Div.*, 635 F.2d 1071, 1078 (3d Cir. 1980), *cert. denied*, 451 U.S. 985 (1981); *Taft Broadcasting Co.*, 163 N.L.R.B. at 478.

utterly disregard these principles. Rather than fostering the "pre-eminent goal" of unit stability, they would stand the labor laws on their head and *require* conduct (*e.g.*, unilateral implementation of new terms on an individual basis) that would subvert such stability. If impasse is not a special circumstance justifying an employer's withdrawal from a multiemployer unit, and if the employer's right at impasse to enter into an interim agreement leaves it with a "duty to abide by the results of group bargaining," impasse simply cannot mark the time when the members of a multiemployer unit become forbidden from further joint conduct with respect to employment terms (or, as the Government suggests,[20] from even discussing matters designed to preserve the integrity of the unit).

Nor is there merit to petitioners' characterization of unilateral implementation as an end in itself or to their efforts to distinguish unilateral implementation from other economic weapons concededly available to multiemployer units at various stages of the bargaining process.

In *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316-17 (1965), this Court recognized that the unilateral imposition of employment terms was one of the economic weapons employers were permitted to utilize by the labor laws. Other federal courts and the Board have adopted the same characterization. *See, e.g., NLRB v. Plainville Ready Mix Concrete Co.*, 44 F.3d 1320, 1340 (6th Cir.), *cert. denied*, 116 S. Ct. 474 (1995); *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1164 (D.C. Cir. 1992) (Edwards, J., statement accompanying *per curiam* opinion); *Colorado-Ute Elec. Ass'n, Inc. v. NLRB*, 939 F.2d 1392, 1404 (10th Cir. 1991), *cert. denied*, 504 U.S. 955 (1992); *Local Union No. 47 v. NLRB*, 927 F.2d 635, 645 (D.C. Cir. 1991); *Hi-Way Billboards*, 206 N.L.R.B. at 23.

Moreover, petitioners' contention that unilateral implementation is principally designed to serve the employer's business interests rather than to influence the bargaining process conflicts directly with

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[20] *See* U.S. Br. at 18.

the principle that unilateral implementation may, indeed, serve to end an impasse and revive the parties' bargaining duty that was, at impasse, only *temporarily* suspended. *See, e.g.*, *Fort Pitt Steel*, 635 F.2d at 1078; *Hi-Way Billboards*, 206 N.L.R.B. at 23; *Circuit-Wise, Inc.*, 309 N.L.R.B. 905, 921 (1992); *Storer Communications, Inc.*, 294 N.L.R.B. 1056, 1090 (1989); *Transport Co. of Texas*, 175 N.L.R.B. 763, n.1 (1969).[21]

Although petitioners would disable the members of a multiemployer bargaining unit from agreeing among themselves to maintain the *status quo* or to implement new terms of employment when the labor laws clearly permit them to do so, they would permit those very same multiemployers (*see* Pet. Br. at 40) to commit themselves to joint bargaining positions, hire replacement workers, contribute to a strike insurance fund, withdraw benefits contained in an expired agreement—and, indeed, even lock out their employees.[22] There is simply no principled basis for this argument.

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[21] The reaching of impasse obviously signifies the temporary inability of the bargaining parties to reach an agreement. While the employer is then licensed to impose employment terms (either by continuing the provisions of the expired agreement or by implementing new terms), it can gain the assurance of labor peace that a no-strike provision affords only by reaching a new agreement with the union. Thus, unilateral implementation is most often a device designed to cause the union to reconsider its bargaining position and thereby stimulate further negotiation; and the terms imposed are almost always more stringent or less charitable than those the employer is prepared to accept as part of an agreement with a no-strike commitment that assures labor peace.

[22] Citing *Buffalo Linen*, 353 U.S. at 97, petitioners suggest that the members of a multiemployer unit can lock out their employees only "as a defensive measure to protect the integrity of the unit." *See* Pet. Br. at 40 n.25. But they ignore, in this context, the Court's holding in *American Ship*, 380 U.S. at 301-02, 310-11, that an employer does not commit an unfair labor practice by locking out its employees solely to bring economic pressure in support of its bargaining position. There is in *American Ship* no suggestion that the

In defense of their approach, petitioners urge the Court to draw a distinction between "terms" and "tactics," and to exclude from the category of "tactics" the employer's right, after impasse, to maintain the *status quo* or unilaterally implement new terms of employment. But the supposed distinction between terms and tactics is one for which petitioners offer no case support (but for the dissent below); and their corollary of convenience—that an employer's imposition of terms is not an economic weapon—is, as demonstrated above, a long-discredited notion.[23]

The collective bargaining regime petitioners and their *amici* would construct exclusively for the multiemployer bargaining process not only departs from that intended by Congress; it would

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labor law rights of single employers and multiemployer units would differ in this regard. Indeed, the Court described the question presented in *American Ship* as "that expressly reserved in" *Buffalo Linen*, without even a hint (although *Buffalo Linen* involved a multiemployer group) that the nature of the employer unit might make the slightest difference. *See* 380 U.S. at 301-02.

[23] In her dissent, Judge Wald acknowledged that in *American Ship*, 380 U.S. at 316, this Court itself had "suggested that post-impasse unilateral imposition of terms may qualify as an economic pressure tactic." Pet. App. 53a-54a. Citing *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 480-81 n.20 (5th Cir. 1963), however, she opined that an employer's right to unilaterally impose terms after impasse was "best understood not as a 'bargaining tactic' but as part of the employer's residual right to continue operating as dictated by business necessity once her statutory duty to bargain has been exhausted." Pet. App. 53a-54a. In *Tex-Tan*, a case decided two years before *American Ship*, the employer did, indeed, institute wage changes that it described as "a matter of economic necessity" (318 F.2d at 480), but the Court of Appeals (citing *Katz*, 369 U.S. at 745) was quick to point out that even after impasse the employer had ""no license to grant wage increases greater than any he has ever offered the union at the bargaining table . . . ."" *Tex-Tan*, 318 F.2d at 481 n.20.

rob the members of multiemployer units of what this Court has found to be an essential benefit of that process—the ability to avoid "the competitive disadvantages resulting from non-uniform contractual terms" (*Buffalo Linen*, 353 U.S. at 96)—while simultaneously exposing them to treble damage antitrust liability that their single employer counterparts do not face.

Under petitioners' construct, the members of a multiemployer group, while able to "commit" to a joint bargaining position, would lack the power to enforce that commitment. Indeed, they could avoid antitrust exposure after contract expiration or impasse only if their concerted conduct resulted in an acceptance of the union's demands. If, instead of accepting a union proposal for a $10 per hour increase, the multiemployer group's members, rather than shutting down their industry, elected to continue the wage scale called for by the expired collective agreement until a new labor contract was reached, or proceeded to implement a $9 per hour increase, petitioners would (notwithstanding their invitation to a rule of reason trial) surely assert that the group's conduct constituted a *per se* violation of the Sherman Act.

With the knowledge that the multiemployer groups facing them across the bargaining table would risk antitrust liability for maintaining the old terms or implementing new ones once impasse was reached, unions would have powerful motive to bargain in a manner designed to create an impasse at the earliest possible time and present the employers with the Hobson's choice of defending an antitrust litigation or entering into interim agreements, on terms acceptable to the union, that would whipsaw them one by one into submission.

Faced with such a choice, no rational employer would voluntarily bargain on a group basis. As a consequence, the salutary benefits—for both management and labor—of multiemployer bargaining, a mode of collective bargaining "vital" to the effectuation of national labor policy, would be sacrificed. Petitioners present no justification for such a result.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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